

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD OUSLEY, JR.,

Defendant-Appellant.

UNPUBLISHED

October 12, 2006

No. 261409

Wayne Circuit Court

LC No. 02-011800-01

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant Bernard Ousley, Jr. of aggravated stalking,¹ and sentenced him to one to five years' imprisonment, with 124 days' credit for time served. In a prior appeal, this Court affirmed the conviction but remanded for resentencing.² The trial court resentenced Bernard Ousley to three months to five years' imprisonment, with 765 days' credit for time served. He now appeals as of right. We reverse and remand. We decide this appeal without oral argument.³

I. Basic Facts And Procedural History

This case arose from allegations that Bernard Ousley harassed his wife, Andrea Ousley, after she obtained a personal protection order. He warned her to watch her back, made threatening remarks, drove past her house, and told her he saw her turning the lights off. The trial testimony primarily concerned Andrea Ousley's allegation that Bernard Ousley fired a gun as he stood outside her home. Andrea Ousley's son testified that he heard gunshots. However, the trial court determined that, although Andrea Ousley and her son were credible, in light of some discrepancies, the evidence did not establish Bernard Ousley's guilt beyond a reasonable doubt with respect to charges of assault with intent to do great bodily harm less than murder⁴ and

¹ MCL 750.411i.

² *People v Ousley*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2004 (Docket No. 246936).

³ MCR 7.214(E).

⁴ MCL 750.84.

possession of a felony during the commission of a felony.⁵ However, the trial court convicted Bernard Ousley of aggravated stalking on the basis of Andrea Ousley's testimony about the repeated contacts after she obtained the PPO. The trial court sentenced Bernard Ousley to one to five years' imprisonment. The trial court explained its sentencing decision, stating:

At this time based on reviewing [Bernard Ousley's] record, really the seriousness of this nature. The fact that there has been contact. There were statements that were made, threatening contact despite a PPO being out. And looking at [Bernard Ousley's] overall adjustment to probation and parole, really have not been favorable.

Bernard Ousley then appealed arguing, in pertinent part, that the trial court erred in sentencing him to imprisonment.

On appeal, this Court explained that because Bernard Ousley's sentencing guidelines range was 0 to 18 months,⁶ the trial court was required to impose an intermediate sanction, which does not include a prison sentence, unless it stated a substantial and compelling reason to sentence Bernard Ousley to the jurisdiction of the department of corrections.⁷ Concluding that the record was not clear regarding whether the trial court found any substantial and compelling reasons to warrant a prison sentence, this Court remanded the case for resentencing with the instruction that "if the trial court finds substantial and compelling reasons to warrant a prison sentence, those reasons must be placed on the record. If it does not, then the trial court must impose an intermediate sanction, which may include a jail sentence of not more than twelve months."⁸

At resentencing, the trial court reduced the minimum term of the sentence from one year to three months but maintained that a prison sentence was warranted because of Bernard Ousley's contacts with Andrea Ousley during and after trial. The trial court explained:

I remember this case, and I am concerned about whether or not—or the behavior of Mr. Ousley. He came back there, repeatedly. And there were some concerns that he was still contacting her after he had been convicted; sending her letters, et cetera. And that was the concern that the Court had had, the contact after he had been incarcerated. He kept getting in touch with her. Because she

⁵ MCL 750.227b.

⁶ We note that there is no dispute that, after scoring both the offense variables and prior record variables under the sentencing guidelines, the upper limit of Bernard Ousley's guidelines was 18 months. Thus, the sentencing court did not violate *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), by engaging in fact-finding to determine the minimum term of Bernard Ousley's indeterminate sentence. *People v McCuller*, 475 Mich 176, 180, 181-182; 715 NW2d 798 (2006).

⁷ *Ousley*, *supra* at slip op pp 3, 4, citing MCL 769.34(4)(a). See also *People v Stauffer*, 465 Mich 633, 635, 636; 640 NW2d 869 (2002), citing MCL 777.1(d) and 769.31(c).

⁸ *Ousley*, *supra* at slip op p 4.

came to court and testified to that at the sentencing. And so that's what would really concern me. It was more of a safety concern than anything else. And that's why the Court sent him to prison as opposed to sending him to jail, because even if it did not appear on the record, there was some consideration, I believe, of whether he got five years probation with the first year in the Wayne County Jail as opposed to getting one to five. And the Court was concerned about the safety, if he were in fact released without something more structured than probation, because I didn't feel that probation would adequately supervise him in a situation where he was engaged in this type of behavior.

Defense counsel noted that the trial court was "concerned, and rightly so" for Andrea Ousley's safety. However, counsel stated that Bernard Ousley had been in prison for nearly two years and he did not think that the trial court had heard from Andrea Ousley since Bernard Ousley had been in prison. The prosecutor urged the trial court to impose a prison sentence so that the parole board would be able to monitor Bernard Ousley's progress. The trial court then explained the reasons for its decision as follows:

The Court recalls this case. And the Court is going to depart for substantial and compelling reasons.

The Court was concerned that [Bernard Ousley's] behavior, during and after trial, caused some concern, because he kept contacting the victim. The nature of the contacts were very—were violent in nature, the allegations. He never did any violent things, but they were violent in nature. And so the Court is going to find substantial and compelling reasons, for those reasons, to depart.

Now, the Court, however, though, in light of the fact that the Court believes that [Bernard Ousley], to his credit, was working at the time, that in fact he had fathered these children, and was trying to, you know, provide for them, this Court is going to reduce its sentence to no less than three months and no more than five years.

Bernard Ousley was given an opportunity for allocution, during which he denied contacting Andrea Ousley while he was incarcerated. The trial court then explained that it believed Bernard Ousley's claim that it wouldn't "ever see [him] in this situation, any more," but that it "just want[ed] parole to supervise [him]."

The trial court then advised Bernard Ousley,

Now that I have entered my decision, and substantially reduced the number of months that I had given you, you will immediately come up for parole. . . . [T]hey're going to look at the fact that the Court had originally given you 12 months, then I went down the three months.

* * *

Now that I've done what I'm going to do, and I've reduced your sentence dramatically, they now can be back and consider you for parole. And what they're going to find out is that the credit that you got was 124 days. The

minimum I gave you was three months. So, technically speaking, you had done the time for the—because you had done the time when he was sentenced.

* * *

Then with the fact that I reduced your sentence, I am inclined to believe that [the parole board] will in fact let you come up, and that they're going to release you. I am inclined to believe that, because the minimum—you'd already done the minimum of time when you left here.

* * *

Now, if you don't hear anything by December, I know you're going to write me a letter and say, "Judge, you're wrong. You don't know—you know about Circuit Court, but you don't know about parole." In that case, the Court will see what it will do at that point, okay? Just bear with me.

Thereafter, the trial court filed a written departure evaluation, which stated, "The defendant's contact with the victim during and after trial was violent in nature."

Bernard Ousley then moved for reconsideration of his sentence. At the hearing on the motion, defense counsel explained that, unbeknownst to him, before the original sentencing, the prosecutor had advised the trial court against probation on the ground that Bernard Ousley was continuing to have contact with Andrea Ousley. Defense counsel argued that the prosecutor's claim was unsubstantiated, and Bernard Ousley denied the allegation. The trial court responded, "I mean the fact of the contact in prison, I didn't look at that, I didn't think that that was glaring at all. As a matter of fact, I completely disbelieved that."

[DEFENSE COUNSEL]: But, Judge, I think you said—I think that's how you justified the sentence, your Honor, you said: "Continuing contacts." Maybe you were referring to the original ones.

THE COURT: I was referring to the original one where he was placed in jail and was sending her letters during the trial.

The trial court explained, "It's just a matter of that the Court was somewhat concerned that when he was in custody here, and the Court did the trial, there was proof that there was contact. They sent the letters from the jail. And that's what I was concerned about. But as far as anything subsequent to that, the Court, you know, made its credibility determinations." The trial court rejected Bernard Ousley's argument about there being a misconception of his earliest release date, explaining that the trial court's belief that Bernard Ousley would be released did not make the sentence invalid.

II. MCL 769.34(4)(a)

A. Overview

This case involves application of MCL 769.34(4)(a), which sets forth the general rule that, if the upper limit of the defendant's recommended minimum sentence range is 18 months or

less, a trial court must sentence the defendant to an intermediate sanction of a maximum jail term of 12 months or less. However, through an expressly stated statutory exception, the trial court may depart from the general rule and, after stating substantial and compelling reasons on the record, instead sentence the defendant to prison.⁹

The Michigan Supreme Court has explained that “an ‘intermediate sanction’ can mean a number of things,¹⁰ but it does not include a prison sentence.”¹¹ Thus, § 769.34(4)(a) requires a trial court to set forth a substantial and compelling reason for imposing a prison sentence, even if

⁹ MCL 769.34(4)(a) states

Intermediate sanctions shall be imposed under this chapter as follows:

If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

¹⁰ See MCL 777.1(d) and 769.31(b). MCL 769.31(b) defines “intermediate sanction” as:

probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed. Intermediate sanction includes, but is not limited to, 1 or more of the following:

- (i) Inpatient or outpatient drug treatment or participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082.
- (ii) Probation with any probation conditions required or authorized by law.
- (iii) Residential probation.
- (iv) Probation with jail.
- (v) Probation with special alternative incarceration.
- (vi) Mental health treatment.
- (vii) Mental health or substance abuse counseling.
- (viii) Jail.
- (ix) Jail with work or school release.
- (x) Jail, with or without authorization for day parole under 1962 PA 60, MCL 801.251 to 801.258.
- (xi) Participation in a community corrections program.
- (xii) Community service.
- (xiii) Payment of a fine.
- (xiv) House arrest.
- (xv) Electronic monitoring.

¹¹ *Stauffer, supra* at 635.

the minimum length of the prison sentence does not exceed the upper end of the range established by the guidelines.¹²

B. Standard Of Review

Bernard Ousley asserts that the trial court failed to state on the record a substantial and compelling reason to resentence him to the jurisdiction of the Department of Corrections. This Court must therefore review the record to determine

whether the trial court had a substantial and compelling reason to depart from the guidelines, recognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference. The deference that is due is an acknowledgment of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender.^[13]

[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion.^[14]

C. Substantial And Compelling Reasons

Initially, we address the prosecution's characterization that the resentencing was a "downward departure" from the original sentence. The prosecution argues that the trial court provided objectively verifiable reasons for the downward departure, including that Bernard Ousley was a father of three boys and had been working before his conviction. The prosecution's argument is misguided. The issue here is not whether the trial court properly justified a reduction in the minimum sentence from one year to three months. The issue is whether the trial court identified a substantial and compelling reason to sentence Bernard Ousley to prison rather than impose an intermediate sanction as required by MCL 769.34(4)(a).

"[I]f there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines."¹⁵ A substantial and compelling reason is an objective and verifiable reason that keenly or irresistibly grabs a court's attention and is of considerable worth in deciding the length

¹² *Id.* at 636.

¹³ *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003).

¹⁴ *Id.* at 264-265 (internal citation and quotation marks omitted).

¹⁵ *Id.* at 264.

of the sentence.¹⁶ The Legislature intended that substantial and compelling reasons exist only in exceptional cases.¹⁷ The trial court is obligated to articulate its substantial and compelling reasons on the record;¹⁸ that is, the sentencing court must specifically articulate the reasons why the objective and verifiable factors it identifies and relies upon “collectively provide ‘substantial and compelling’ reasons to except the case from the legislatively mandated regime.”¹⁹ Further, it is not enough that this Court conclude that potentially substantial and compelling reasons existed to justify the trial court’s decision.²⁰ The trial court may not justify departure on factors already taken into account in determining the guidelines range.²¹ However, the trial court may use factors already considered in scoring if they may have been given inadequate weight in determining the guidelines range.²²

With respect to Bernard Ousley’s contentions, we first point out that there is no merit to his claim that the trial court “did not state on the record that it was departing from the sentencing guidelines for substantial and compelling reason[s].” The trial court explicitly stated, “And this Court is going to depart for substantial and compelling reasons.”

Bernard Ousley also claims that the trial court did not base resentencing on any factor that was objective and verifiable, noting that the trial court admittedly based its findings on unspecified “allegations.” According to Bernard Ousley, “an unarticulated allegation does not keenly or irresistibly grab our attention[.]”

When viewed as a whole, the trial court’s statements indicate that it relied on two factors to sentence Bernard Ousley to the jurisdiction of the department of corrections. The first reason was alleged continued contact between Bernard Ousley and Andrea Ousley, specifically, letters that Bernard Ousley wrote to Andrea Ousley while in jail. The second reason was the trial court’s desire that Bernard Ousley be subject to the presumably stricter supervision of parole rather than probation. That is, the trial court was concerned that if sentenced to jail, Bernard Ousley would serve a minimal amount of time and then be released on probation, whereas if sentenced to prison, his release would be dependant on a parole board’s review of his behavior, and, upon release, he would be subject to the supervision of a parole officer.

Our review of the record reveals the significant absence of any support for the allegation that Bernard Ousley continued to contact Andrea Ousley during or after trial. There is no testimony from Andrea Ousley or argument from counsel during the trial regarding any continued contact. Further, prior to the original sentencing hearing, Andrea Ousley sent a letter

¹⁶ *Id.* at 257.

¹⁷ *Id.*

¹⁸ *Id.* at 258-259.

¹⁹ *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000).

²⁰ *Babcock*, *supra* at 258-259.

²¹ *Id.* at 258 n 12.

²² *Id.*

to the trial court. This letter, which is filed in the lower court record, states in part, “Bernard had more than enough times to think about getting back at me. The phone calls will continue to come, he will continue to call and come by my job looking for me.” At the original sentencing hearing, Andrea Ousley stated in her victim impact statement that “when he got out on the domestic violence he violated his parole and he came around to the house and he was calling” Neither the letter nor her statement indicate that Bernard Ousley continued to contact her during or after trial—they merely refer to his prior contact and her prediction that he would likely contact her again. Because the earlier contacts were the basis for the conviction of aggravated stalking, they are not a substantial and compelling reason for not imposing an intermediate sanction.²³ Likewise, a complainant’s predictions of a defendant’s future conduct do not constitute a substantial and compelling reason for an upward departure.

It was not until resentencing and reconsideration that the trial court specifically referred to the alleged letters Bernard Ousley sent to Andrea Ousley during and after trial. However, there is no evidence of these letters in the record, and the trial court did not specify the quantity or content of the letters. A substantial and compelling reason is an objective and verifiable reason that keenly or irresistibly grabs a court’s attention and is of considerable worth in deciding the length of the sentence.²⁴ The mere alleged existence of these letters is insufficient to constitute considerable worth in deciding the length of the sentence. Absent more detailed information about these alleged letters, we cannot determine whether the existence of the letters is objective and verifiable, or whether the trial court abused its discretion in concluding that the letters constitute substantial and compelling reasons to depart from an intermediate sanction.

With respect to the eligibility for parole supervision rather than probation, we conclude that this reason fails to state “an objective and verifiable reason that keenly or irresistibly grabs a court’s attention and is of considerable worth in deciding the length of the sentence.”²⁵ Further, we conclude that Bernard Ousley has not established that he is entitled to relief based on the trial court’s misconception that he would immediately be considered for parole after resentencing.

Because we conclude that the trial court failed to sufficiently state on the record substantial and compelling reasons to warrant a prison sentence, we again remand this case for resentencing. On remand, the trial court shall provide a more complete articulation of the basis for its departure. If the trial court is unable to provide more detailed information for its departure, then it must resentence Bernard Ousley to an intermediate sanction. If, however, the trial court continues to believe that substantial and compelling reasons exist to support Bernard Ousley’s prison sentence, it must specifically articulate those reasons on the record.

D. *People v McCuller*

If on remand the trial court still believes a prison sentence is warranted, we note that, in light of the Michigan Supreme Court’s recent decision in *People v McCuller*, which held that “a

²³ *Id.* at 258 n 12.

²⁴ *Id.* at 257.

²⁵ *Babcock*, *supra* at 257.

sentencing court in an indeterminate sentencing scheme does not violate *Blakely* by engaging in fact-finding to determine the minimum term of a defendant's indeterminate sentence *unless the fact-finding increases the statutory maximum sentence to which the defendant had a legal right*,"²⁶ the trial court may wish to consider whether the judicial fact-finding involved in articulating substantial and compelling reasons for an upward departure, under the § 769.34(4)(a) exception, runs afoul of the Court's statement in *McCuller*.

Reversed and remanded for resentencing and other appropriate proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

²⁶ *McCuller, supra* at 180 (emphasis added).